

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNY DOFNER,

Defendant.

CASE NO. 8:09CR81

**MEMORANDUM
AND ORDER**

Defendant Kenny Dofner has submitted a petition (Filing No. 316) seeking relief under 28 U.S.C. § 2255, in which he asserts that the United States Supreme Court's decision in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), applies retroactively and should be applied to vacate his 2010 convictions for (1) conspiracy to distribute cocaine and methamphetamine, and (2) possession of a firearm during a drug trafficking crime.

In his petition (Filing No. 316 at CM/ECF page 8 of 22), Dofner asserts that he entered a plea of not guilty to the offenses, and went to trial before a judge. In fact, Dofner entered pleas of guilty to both counts, and entered into a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement, stipulating to the sentences that he received.

The *Alleyne* decision has not been applied retroactively in the Eighth Circuit, and is inapplicable to Dofner's case. He has raised no other viable arguments in his petition.

Dofner also requests a Certificate of Appealability in the event his petition is denied. (Filing No. 316 at CM/ECF page 5 of 22.) Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), the right to appeal the denial of a § 2255 motion is governed by the certificate of appealability requirements of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c)(2) provides that a certificate of appealability may issue only if the applicant has made a substantial showing of the denial

of a constitutional right. A “substantial showing of the denial of a constitutional right” requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were “adequate to deserve encouragement to proceed further.”” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). The Court concludes that the Defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c).

IT IS ORDERED:

1. Defendant Kenny Dofner's petition for relief under 28 U.S.C. § 2255, and request for certificate of appealability (Filing No. 316) is denied;
2. A separate Judgment will be issued denying the § 2255 motion; and
3. The Clerk is directed to mail a copy of this Memorandum and Order to the Defendant at his last known address.

DATED this 29th day of October, 2013.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge